

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACK GUTHRIE

Claimant

VS.

INDUSTRIAL COMMERCIAL INSULATION

Respondent

AND

ITT HARTFORD

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 150,975

ORDER

ON the 31st day of March, 1994, the respondent and insurance carrier's application for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark dated February 21, 1994, came on before the Appeals Board for oral argument.

APPEARANCES

Respondent and insurance carrier appeared by their attorney Boyd A. Byers, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Cinda L. Smith, of Hutchinson, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

In his Award of February 21, 1994, the Administrative Law Judge found that the Kansas Workers Compensation Fund was responsible to reimburse the respondent and

insurance carrier for the temporary total and medical benefits paid in this proceeding. The Administrative Law Judge denied respondent's request for reimbursement of monies paid to claimant in the lump sum settlement. The respondent and insurance carrier appeal that denial of reimbursement. The sole issue before the Appeals Board is Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

(1) The respondent and insurance carrier are entitled to be reimbursed by the Kansas Workers Compensation Fund all benefits paid to claimant associated with this proceeding. The Award of the Administrative Law Judge is modified in this respect.

(2) The facts are not in dispute. Claimant commenced his employment with respondent in 1981 and worked as a pipe insulator and metal worker. As a result of repetitive work activities, claimant developed bilateral carpal tunnel syndrome and underwent surgeries for this condition in March and April 1989. Following these surgeries, claimant was off work for approximately eight weeks and ultimately settled a workers compensation claim for \$10,000.00. Board certified orthopedic surgeon, Tyrone D. Artz, M.D., opined that as of July 3, 1989, claimant had a permanent functional impairment of five percent (5%) to each upper extremity. Respondent filed a Form 88 on July 12, 1989, to document its knowledge of claimant's impairment.

After recuperating from his surgeries, claimant was released to work without restrictions by Dr. Artz, and claimant resumed his employment with respondent on July 6, 1989. Claimant performed his work without additional problems until October 1989, when he reached out to catch a falling ladder and reinjured his hands. Claimant again consulted Dr. Artz who took him off work for several weeks. Claimant was again released to work without permanent restrictions.

Claimant resumed his employment with respondent and worked without incident until May 1990, when he felt he had reinjured his hands as a result of his repetitive work related activities. Claimant testified that as a result of his increased symptomatology in May 1990, he could no longer perform his job duties. Claimant believes that his hands and arms are worse now than before his surgeries. In June 1990, Dr. Artz for the first time imposed permanent work restrictions and limitations upon claimant.

Claimant testified that he continues to experience increased numbness and tingling in his hands and a popping sensation in his wrists. Based upon claimant's testimony, the Appeals Board finds that claimant has experienced a permanent aggravation of his preexisting impairment to the upper extremities as a result of his work activities culminating May 1990.

The Appeals Board is mindful that Dr. Artz testified that claimant did not experience increased impairment of function to his upper extremities as a result of the alleged work related accident now at issue. However, the opinion of Dr. Artz was based on inaccurate medical history as Dr. Artz did not realize that claimant was again experiencing the numbness and tingling in his hands which has previously resolved following his surgeries. During his deposition, Dr. Artz stated, "If he was getting numbness back and it was coming and staying, that was then requiring surgery again or something like that, yeah, then I would think that he's getting more impairment...." [Artz depo., p. 21] Claimant testified that he was, in fact, suffering from prolonged numbness and tingling in his hands. At his

deposition, claimant said, "When it really gets sore and your hand, you know, tingles for hours, just there and until I get the swelling down, the nerves or something, like the foot is asleep, you know how you get those sharp needley sticks...." [Guthrie depo., p. 12]

The Appeals Board is also mindful that Dr. Artz testified that he felt claimant was merely experiencing a temporary flare-up of the symptoms related to his previous carpal tunnel syndrome. Dr. Artz testified that temporary flare-ups were not out of the ordinary and a lot of patients experience it depending upon their activities. Dr. Artz also testified that he expects someone who has a rating for bilateral carpal tunnel syndrome to have flare-ups from time to time because their hands are not normal, and as long as those flare-ups are temporary in nature and resolve with minor treatment and there is no progression or recurrence of numbness and tingling, then the flare-up falls within the scope of the previous impairment and rating. The Appeals Board finds the analysis of Dr. Artz to be somewhat flawed as claimant testified that his symptoms did not resolve, but have worsened to the point that he can no longer engage in his former employment and that he now experiences numbness and tingling of a chronic nature.

Dr. Artz does concede that claimant's symptoms were worse when he saw him in 1990 than they had been in 1989. Also, Dr. Artz did not feel that work restrictions or vocational rehabilitation were necessary when he released claimant in 1989, whereas claimant's symptomatology has now worsened to the extent that he needs permanent restrictions and a change of occupation.

It is the function of the trier of fact to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own decision. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

(3) The Kansas Workers Compensation Fund contends that it should not be liable for any of the benefits paid as a result of claimant's increased symptomatology because claimant did not receive a higher impairment of function rating from Dr. Artz. Such factor is not controlling. See Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, 698 P.2d 392 (1985), where the Kansas Court of Appeals held that claimant had experienced a compensable second accidental injury despite the fact that the impairment of function was not increased by the second accidental injury.

Whenever a handicapped employee is injured or is disabled as a result of a subsequent work related accident, and the injury or disability most likely would not have occurred but for the preexisting impairment, all compensation and benefits payable because of the injury or disability shall be paid from the workers compensation fund. K.S.A. 44-567(a)(1). As Dr. Artz felt claimant's increased symptomatology was a flare-up of symptoms related to the earlier bilateral carpal tunnel syndrome, it is axiomatic that the flare-up would not have occurred but for the preexisting condition. Therefore, the Kansas Workers Compensation Fund is liable for the entirety of the award.

(4) Based upon the facts and circumstances surrounding this proceeding, the Appeals Board finds the lump sum settlement agreement entered into between the respondent and claimant to be fair and reasonable. The lump sum settlement extinguished a significant risk that the respondent and insurance carrier would ultimately be held responsible for vocational rehabilitation benefits and permanent partial general disability benefits based upon work disability.

It should be noted that claimant was reporting an increase in symptomatology over and above that which he had experienced with the initial onset of carpal tunnel syndrome, and symptoms that he had never before experienced. Also, claimant was contending that his symptoms had progressed to the point that he could no longer perform his former job duties. Claimant's testimony, coupled with the information contained in the letter from Dr. Artz dated October 26, 1992, that indicated that claimant's symptoms had worsened to the level that permanent restrictions and a change of occupation were necessary, lead the Appeals Board to conclude that the respondent and insurance carrier were very prudent, from a defense standpoint, in the settlement of this claim.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 21, 1994, is modified in that the Kansas Workers Compensation Fund is ordered to reimburse the respondent and insurance carrier all of the costs and benefits paid to claimant associated with this proceeding, including temporary total, medical, and lump sum payment. The order of the Administrative Law Judge pertaining to payment of expenses is hereby adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Vaughn Burkholder, 700 Fourth Financial Center, Wichita, Kansas 67202
Cinda L. Smith, PO Box 2977, Hutchinson, Kansas 67504-2977
John D. Clark, Administrative Law Judge
George Gomez, Director